IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. 79-616

MOHASCO CORPORATION,
Petitioner,

vs.

RALPH H. SILVER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER MOHASCO CORPORATION

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I

The United States and the Equal Employment Opportunity Commission, as *amici curiae* (hereinafter referred to collectively as the "Solicitor General") argue that, in a deferral state, the applicable state limitations period cannot *shorten* the 180-day filing period provided for in § 706(e).[1] (Sol. Gen. Br. 39 n. 15).

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1 42 U.S.C. § 2000e5(e) (hereinafter referred to as "§ 706 (e)") of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as "Title VII").

Mohasco agrees with this. It is clear that a state may not shorten the period within which a complainant must file with the EEOC by establishing a state limitations period of *less* than 180 days. *See Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1232-33 (8th Cir. 1975) *(en banc); cf., Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 60 L.Ed.2d 609 (1979).

However, citing the current regulations of the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC"), specifically 29 CFR § 1601.13(d)(2)(iii) (1979), the Solicitor General also argues that applicable state limitations periods can extend § 706(e)'s filing period for any length of time up to 300 days (Sol. Gen. Br. 38-41). With respect to this assertion, Mohasco respectfully submits that the conclusion reached by an *en banc* Eighth Circuit in *Olson* that Title VII sets very specific *federal* limitations periods which *are not at all affected* by state limitations periods not only makes a great deal more sense than the Solicitor General's position as a practical matter, but also fully comports with the applicable statutory language. Thus, § 706(e) requires each complainant, in order to preserve his *federal* rights, to file within 180 days. In a non-deferral state, the complainant must file with the EEOC within 180 days. In a deferral state, the complainant must file with the 706 Agency within 180 days, but then is permitted 300 days within which to "file" his charge with the EEOC.[2] The "extra" 120 days for filing with the EEOC granted by § 706(c)[3]

2 The Solicitor General Notes that *Olson, supra*, and *Geromette v. General Motors Corp.,* 609 F.2d 1200 (6th Cir. 1979) involved state limitations periods of less than 180 days. However, the scholarly decision of Judge Schwarzer in *Wiltshire v. Standard Oil Co. of California,* 447 F. Supp 756 (N.D. Cal. 1978), as well as the opinion in *Bittner v. Combustion Engineering,* 19 FEP Cases 1295 (N.D. Cal. 1979), both involved cases arising in California, which, like New York, has a one-year limitations period (California Fair Employment Practice Act, California Labor Code § 1422 (Deering)), and both cases applied the *Olson* analysis.

3 42 U.S.C. §2000e-5(c) (hereinafter referred to as "§ 706(c)").

to a complainant in a deferral state is provided to permit the exhaustion of *state* remedies before resorting to *federal* remedies, and is necessary because of § 706(c)'s prohibition against the "filing" of a charge with the EEOC within the deferral period. (Pet. Br. 9-24; EEAC Br. 21-34).

As stated by the court in *Wiltshire, supra,* 447 F. Supp. at 759-60:

> "Limitations periods, moreover, are 'primarily designed to assure fairness to defendants' by protecting them from stale claims. . . .The limitation period in Section 706(e), even though part of remedial legislation, is no exception to this rule. . . .In adopting Section 706(e), Congress determined that defendants in non-deferral states are to be protected from claims arising more than 180 days prior to filing. The mere fact that an employer may be located in a deferral state does not justify a court's expanding this period to 300 days and requiring the defendant to respond to claims arising more than 180 days prior to any filing.
>
> "That the statute provides claimants in deferral states with an additional 120 days in which to file with the *EEOC* does not affect this reasoning. That period of time, as explained by Senator Dirksen, is designed to allow the claimant to pursue his state remedy as a condition precedent to his filing with the EEOC. (See pp. 758-759 above) It was inserted into the legislative compromise 'to keep primary, exclusive jurisdiction in the hands of the State Commissions for a sufficient period of time to let them work out their own problems at the local level.' Remarks of Senator Dirksen, 110 Cong.Rec. 13087(1964). The purpose underlying this section was to facilitate, in the interest of comity, the resolution of disputes at the local or state level by providing time for the 706 agency to process the claim without jeopardizing federal rights. It was not to extend by 120 days the

time for assertion of those federal rights.[4]"

(Citations omitted; footnote renumbered.)

This analysis, it is submitted, sufficiently disposes of the position taken by the Solicitor General that it would be inconsistent with the policy of deference to state procedures to require a complainant, as a prerequisite to invoking his federal rights, to file with the state within a federally imposed limitations period shorter than 300 days. (Sol. Gen. Br. 15, 38-41).

However, if this Court were to reject *Olson's* conclusion that a complainant in a deferral state is required to file a charge with the 706 Agency within 180 days, then it is Mohasco's position that a charge received by the EEOC more than 180 days after the alleged discriminatory act can be viewed as timely "filed" only if the complainant thereafter institutes timely state proceedings within the deferral period. This result is required because § 706(c) prohibits the EEOC from "filing" a charge until the deferral period has expired, and a complainant is *only* entitled to § 706(e)'s 300-day limitations period if he has "initially instituted" state proceedings.[5] This principle is

4 "That the 120 days period was intended only to give time to exhaust state or local remedies is confirmed by the fact: (1) that a similar period is provided for exhaustion of those remedies before the EEOC may file a charge during the first year of operation of 706 agency (Sec. 706(c)), and (2) that once the 706 agency has terminated its proceeding, the claimant has only thirty days within which to file with the EEOC, even if the result is to give him less than the full three-hundred days. (Sec. 706(e)) Inasmuch as the 120 day add-on period in a deferral state can thus be cut short by action of the 706 agency after a claim is timely filed, it makes little sense to grant a claimant its full benefit on the strength of his earlier failure to make a timely filing."

5 *Oscar Mayer* would support the proposition that the EEOC's mailing of a charge to the 706 Agency "commences" state proceedings for purposes of calculating § 706(c)'s deferral period. However, § 706 (e) does not provide any basis for deeming a 706 Agency proceeding to have been "instituted" at any time earlier than the date it is instituted under state law. For that matter, the very fact that § 706(c) has such a deeming provision, which by its express terms applies only with respect to calculating the deferral period pursuant to § 706(c), and § 706(e) has no such provision makes it pellucid that it is state law that determines when the 706 Agency proceedings are "instituted" for § 706(e) purposes. This is particularly clear in view of the underlying statutory pattern of deferring EEOC action to permit similar actions first to be undertaken by 706 Agencies. *Love v. Pullman Company,* 404 U.S. 522, 526 (1972); *Doski v. M. Goldseker,* 539 F. 2d 1326, 1330 (4th Cir. 1976).

It is undisputed that Respondent Ralph H. Silver (hereinafter referred to as "Silver") first instituted his New York State Division of Human Rights (hereinafter referred to as "Human Rights Division") proceedings for purposes of New York law by filing his verified complaint with that agency on August 12, 1976, 349 days after his termination. Because that date is well beyond even the 300-day limitations period, Silver could not possibly have "initially instituted" state proceedings, because no timely "filing" could have been made with the EEOC at that time.

implicitly recognized, albeit only to a slight extent, in the EEOC regulation which permits the EEOC to "process" complaints submitted between 180 and 300 days after the alleged unlawful discriminatory practice *only* if the charge is still timely under state law (29 CFR § 1601.13 (d)(2)(iii) (1979)).

The Solicitor General's position, thus, not only lacks statutory support, but also leads to an extremely complicated filing scheme. The irony of this is that the Solicitor General criticizes Mohasco's alternative construction of Title VII's filing provisions (based on *Doski,* v. M. Goldseker, 539 F.2d 1326 (4th Cir. 1976)) as "cumbersome" and "yielding a speculative limitations period in every case" (Sol. Gen. Br. 17). Certainly, the *Olson* reading of the statutory limitations periods is not subject to such criticism. However, should this Court not find the *Olson* reading persuasive, the result reached from following the *Doski* reading, which fully comports

with the statutory language in stark contrast to the Solicitor General's interpretation (Pet. Br. 26-38), is less "cumbersome" and "speculative" than the result reached by following the Solicitor General's interpretation. The results that flow naturally from the *Doski* interpretation of § § 706(c) and (e) cannot be criticized as unworkable. As stated by Judge Meskill in dissent below:

> "As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state has created an agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely."
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> (Cert. Pet. App. A39).

Accord, Moore v. Sunbeam Corporation, 459 F.2d 811, 829-30 (7th Cir. 1972).

II

Silver and the Solicitor General both claim that this Court's decision in *Oscar Mayer, supra,* supports the result reached by the majority in the Second Circuit below (Resp. Br. 23-24; Sol. Gen. Br. 21-23).

Oscar Mayer dealt with the timeliness of a charge filed under the Age Discrimination in Employment Act of 1967 (hereinafter referred to as "ADEA"). In that case, the Court held:

> ". . .that § 14(b) [of the ADEA] mandates that a grievant not bring a suit in federal court under § 7(c) of the ADEA until he has first resorted to appropriate state administrative proceedings. We also hold, however, that the grievant is not required to commence the state proceedings within time limits specified by state law."
>
> *(Oscar Mayer, supra,* 441 U.S. at ____, 60 L.Ed.2d at 614.)

It is true that ADEA § 14(b) is patterned after and is virtually *in haec verba* with § 706(c) of Title VII.

Similarly, it is correct that *Oscar Mayer* would support the proposition that the EEOC's mailing of a discrimination charge to a 706 Agency "commences" state proceedings for § 706(c) deferral purposes (see *Oscar Mayer, supra,* 441 U.S. at ____, 60 L.Ed.2d at 618-19). Furthermore, *Oscar Mayer*'s holding that an aggrieved person is not required to "commence" timely state proceedings in order to be entitled to maintain a federal suit would appear to apply by analogy to a Title VII action arising in a deferral state where the complainant has "filed" with the 706 Agency within 180 days and with the EEOC within 300 days. Indeed, *Olson* anticipated the *Oscar Mayer* decision by holding precisely that. *Olson, supra,* 511 F.2d at 1232.

Beyond this, however, it is unclear how far *Oscar Mayer*'s conclusions with respect to the ADEA can be applied to Title VII because the ADEA differs from Title VII in two vitally important ways.

First, the ADEA has no provision analagous to the one contained in § 706(e) that the extended 300-day filing period is available *only* to an aggrieved person who has *initially instituted* state proceedings. In fact, ADEA § 7(d) makes it clear that the ADEA *automatically* extends a complainant's time to initiate federal agency proceedings if the complainant is in a deferral state. In spite of this obvious and striking difference in statutory language, the Solicitor General suggests that § 706(e) should be read the same way as ADEA § 7(d). (Sol. Gen. Br. 42-43). Mohasco respectfully submits that where Congress

has adopted two statutes that are similarly worded, it should be presumed that Congress intended such major differences in language as may exist to mean something. In this context, the language difference between § 706(e) and ADEA § 7(d) clearly suggests that Congress chose to extend Title VII's 180-day limitations period to 300 days *only* for those individuals who "initially instituted" state proceedings, rather than automatically providing the extended filing period to all who reside in a deferral state as was done in the ADEA. As explained in Mohasco's Brief, since under no reasonable interpretation of § 706(e) can Silver be viewed as having "initially instituted" state proceedings, Silver clearly was not entitled to the 300-day filing period. (Pet. Br. 24-29). Thus, even if Silver's charge is deemed to have been "filed" by the EEOC when it was received 291 days after his termination, the charge was untimely.

Second, Title VII provides for sequential state and federal jurisdiction in contrast to ADEA's concurrent state and federal jurisdiction *(Oscar Mayer, supra,* 441 U.S. at ___ , 60 L.Ed.2d at 616). One court, at least, has viewed this difference as limiting the application of *Oscar Mayer* in a Title VII action. In *Albano v. General Adjustment Bureau, Inc. (GAB),* 478 F. Supp. 1209 (S.D. N.Y. 1979), a Title VII plaintiff submitted a charge to the EEOC within 180 days after the alleged unlawful discriminatory practice. The EEOC forwarded the charge to the New York City Commission on Human Rights ("CCHR"), which requested the plaintiff to file a formal CCHR complaint. The plaintiff chose not to do this, and never initiated proceedings before either the CCHR or the Human Rights Division (which, pursuant to New York law, has concurrent jurisdiction with the CCHR). In this situation, the court said:

> "The plaintiff contends that the reasoning of *Oscar Mayer* applies as much to Title VII as it does to the ADEA and that, as a result, her initial failure to file with the state as required by section 706(b) was cured by her filing with the CCHR after commencement of the instant action. This Court cannot agree. While the purposes of both the ADEA and Title VII are, in many ways, very similar, the procedural mechanisms and time strictures established for them vary greatly. As the Supreme Court noted in *Oscar Mayer,* ___ U.S. at ___, 99 S.Ct. at 2071-72, Title VII, unlike the ADEA, which provides for concurrent federal and state agency jurisdiction, provides for sequential jurisdiction whereby the person aggrieved must first file with the state antidiscrimination agency before being able to file with the EEOC. As a result, only after the appropriate state agency has been given its required opportunity to resolve the claim does the EEOC obtain the subject matter jurisdiction necessary so as to proceed with its investigation and issue a 'right to sue' letter. If the EEOC acts, as it did in the instant action, before the state agency has had such an opportunity, it has done so in derogation of section 706(b) and without the requisite jurisdiction. Such a failing cannot be cured by a subsequent filing with the state."
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> *(Albano, supra,* 478 F. Supp. 1212-13; footnote omitted.)

Similarly, it is only after the expiration of § 706(c)'s deferral period that the EEOC can deem a charge to be "filed". *Love, supra,* 404 U.S. at 526, note 5. If § 706(e)'s extended limitations period expires before that "filing" date, the EEOC never obtains subject matter jurisdiction over the charge because no timely charge was ever "filed" with the EEOC.

III

The Solicitor General asserts that Congress enacted a new § 706 in 1972, and that, therefore, it is the legislative intent of the 1972 Congress that should control the interpretation of § § 706(c) and (e). (Sol. Gen. Br. 36-38).

This curious assertion appears to be based on the premise that the 1972 Congress *considered* making substantial changes in § 706. Thus, argues the Solicitor

General, the relatively minor modifications to § 706 (primarily consisting of extending by 90 days the normal and extended filing periods provided by § 706(e)) *actually* made by Congress should be viewed as a *reenactment* of that section, rather than a mere amendment. This argument is an obvious attempt by the Solicitor General to preclude consideration of the legislative intent of the 1964 Congress which in fact enacted Title VII.

In support of this position, the Solicitor General (Sol. Gen. Br. 37) quotes from *Teamsters v. United States,* 431 U.S. 324, 354 n.39 (1979). In fact, if the *Teamsters* statement is relevant at all, it stands for the opposite proposition, since the Court said:

> ". . .More importantly, the section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls."
>
> *(Teamsters, supra,* 431 U.S. at 354 n.39.)

Both the Solicitor General (Sol. Gen. Br. 35) and Silver (Resp. Br. 17) similarly mischaracterize a statement from *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 365 (1977) in an attempt to bolster the strength of the Section-by-Section Analysis of the 1972 amendments, 118 Cong. Rec. 7564, on which they both rely so heavily. An analysis of *Occidental* leads to the conclusion that this Court did not hold that the Section-by-Section Analysis is, in and of itself, the "final and conclusive confirmation of the meaning" of either "the statute" (Resp. Br. 17) or "the 1972 amendments" (Sol. Gen. Br. 35). Rather, with respect to § 706(f)(1), the court found the Section-by Section Analysis to be the last piece of evidence of an unambiguous legislative intent which foreclosed one argument concerning the proper interpretation of § 706(f)(1). The lack of relevance of this statement to the instant matter is clear.

It is submitted that the entire legislative history of Title VII, when viewed as a whole, supports Mohasco's interpretation of § § 706(c) and (e). *See* Pet. Br. 29-38; EEAC Br. 13-17; 29-34.

IV

Silver asserts that, if this Court holds Silver's charge is otherwise untimely, it should consider the statutory time limits not as "jurisdictional prerequisites" (so that compliance with them is mandatory), but as "statutes of limitation" (which are subject to equitable tolling) and hold Silver's charge to have been timely filed. (Pet. Br. 24-26). The Solicitor General similarly argues that if this Court concludes the EEOC's interpretation of Title VII's time limitations is incorrect, that conclusion should be applied prospectively only, and not to Silver or similarly situated complainants. (Sol. Gen. Br. 43, n. 17).

It is certainly true that courts have variously described Title VII's time limits as "jurisdictional prerequisites" and "statutes of limitation". *See e.g., Smith v. American President Lines, Ltd.,* 571 F.2d 102 (2d Cir. 1978); and *Daughtry v. King's Department Stores, Inc.,* 608 F.2d 906 (1st Cir. 1979). Here, however, as was the case in *Smith* and *Daughtry,* the Court is not presented with any facts that would justify "tolling" even if such were permissible, and thus the Court need not decide this important question at this point.

Since this Court's decision in *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976), those courts which have held that § 706(e)'s limitations periods are subject to "tolling", have held "tolling" to be appropriate only: (1) during the pendency of an action before a state court that had subject matter jurisdiction, but which was the wrong forum under state law; (2) to defer the commencement of the running of the 180-day period until the complainant knew, or should have known, the facts that would give rise to his Title VII action and where

it is established that the defendant has affirmatively misled the complainant; and (3) when the EEOC misleads a complainant as to the nature of his Title VII rights. *Chappell v. Emco Machine Works Co.,* 601 F.2d 1295, 1302-03 (5th Cir. 1979) (citing cases).

Here, Silver clearly has not alleged any set of circumstances justifying a "toll" under any one of these rationales, assuming, *arguendo,* that "tolling" of § 706(e)'s limitations period is ever appropriate. In fact, neither Silver nor the Solicitor General advances any equitable rationale for tolling the limitations period based on the record facts in this case. (Resp. Br. 24-26; Sol. Gen. Br. 24). Rather, both seem satisfied to presumptuously state Mohasco can claim no prejudice if this Court holds Silver's claim to be timely regardless of the absence of equitable grounds. [6]

6 With respect to the prejudice question, Mohasco respectfully refers the Court to Judge Meskill's discussion of the EEOC procedure followed in this case, where he said:

> "Although the majority assures us that the interpretation adopted today 'does not countenance the filing of stale claims,' I respectfully suggest that when Congress bestows new rights and remedies on some persons and imposes new obligations and liabilities on others, its judgment regarding how and when claims are to be asserted and preserved ought not to be lightly disregarded. 'Even though a statute of limitations may "permit a rogue to escape," the legislative commands must be respected.' [Citations omitted.] Second, to the extent that the repose granted by Congress to potential defendants has been delayed, they have been adversely affected by the EEOC practice. Finally, the language of the statute indicates that the result reached today was simply not intended by the authors of Title VII. Deference to agency interpretation is appropriate only when consistent with deference to the intent of Congress.
>
> "Referring to the many 'procedural requirements and time limitations that must be met before a claim of discrimination can be brought to the attention of a federal court,' and *citing Love v. Pullman, supra,* we have remarked:
>
> > The procedures thus mandated exist not for their own sake, but rather in futherance of substantive purposes. . . .[T] he rigid insistence on meticulous observance of technicalities *unrelated to any substantive purpose* is inappropriate.
>
> *'Weise v. Syracuse University,* 522 F.2d 397, 411, 412 (2d Cir. 1975) (citations omitted). It must be remembered, however, that where, as here, a procedural requirement *does* further a substantive purpose, it is judicial disregard of the statutory design that is inappropriate."
>
> (Cert. Pet. App. A43 - A44; citations omitted; footnote omitted.)

Silver's only conceivable argument for tolling is that the EEOC somehow misled him as to the time limits within which he had to file. This assertion, however, is belied by the following statement contained in Silver's charge-letter: "I learned from Mrs. Lyn Miller *today* that I have only 300 days in which to file a claim". (App. 3; emphasis added). Silver's charge-letter is dated June 10, 1976, 286 days after his employment with Mohasco terminated, and well after § 706(e)'s 180-day limitations period had expired. Thus, if this Court accepts the *Olson* interpretation of § 706(e) requiring in all instances a "filing" within 180 days, the EEOC's "advice" occurred at a time when Silver could no longer file a valid charge. It would seem clear that the EEOC cannot make timely an untimely discrimination charge merely by telling a complainant that he still has a few days in which to "file".

Furthermore, even if the EEOC gave the advice Silver attributes to it, the EEOC did not say Silver had 300 days in which to "submit" his charge to the EEOC, but that he had to "file" his charge within 300 days. Thus, even if this Court does not accept the *Olson* interpretation of § 706(e), this "advice" was perfectly proper under the interpretation attributed to §§ 706(c) and (e) by *Doski,*

supra. Under the *Doski* rationale, Silver could have "filed" a timely complaint with the EEOC if, but only if, he submitted a charge to the EEOC and also instituted proceedings with the Human Rights Division which terminated before the 300-day period expired.

In any event, it is clear that the EEOC's advice did not cause Silver any injury by misleading him into taking action he would not otherwise have taken, or into delaying any action he would otherwise have taken sooner. Thus, this Court need not decide whether § 706(e)'s limitations period is jurisdictional or a statute of limitations because neither Silver nor the Solicitor General has presented any facts which would justify a "toll" even if tolling were held to be appropriate. *Smith, supra,* 571 F. 2d at 108-111. Similarly, there is no reason for this Court to decline to apply the interpretation established by this case to Silver.

As stated recently by the Eighth Circuit in an ADEA case:

> "Noticeably missing from the record are any allegations that would justify, on an equitable basis, taking the limitations period protection away from [the defendant] American Wheel and Brake. Equity, in a pure sense, is as Justinian states, 'to live honestly, to harm nobody, to render every man his due. 'Institutes 1, 1, 3. We obviously harm Larson if we bar his cause of action in this case; on the other hand, we harm American Wheel and Brake if we allow the cause of action. Thus, in balance, it appears that the tipping of the scales must be to 'render every man his due.' "
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> *(Larson v. American Wheel and Brake, Inc.,* 610 F. 2d 506, 510 (8th Cir. 1979).)

Mohasco asks for no more than this.

CONCLUSION

For all of the foregoing reasons, as well as for those reasons set forth in our original brief, we respectfully request the Court to reverse the decision of the Second Circuit Court of Appeals and remand this case to the district court with directions to dismiss all aspects of this lawsuit relating to any claims of discrimination by Mohasco alleged to have occurred more than 180 days or, alternatively, more than 300 days before Silver's complaint was "filed" with the EEOC.

Respectfully submitted,

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